

MONTANA DEPARTMENT OF JUSTICE  
Jeremy S. Craft, Agency Legal Counsel  
Agency Legal Services Bureau  
1712 Ninth Avenue  
PO Box 201440  
Helena, MT 59620-1440  
Phone: (406) 444-7375  
Fax: (406) 444-4303  
Jeremy.Craft@mt.gov

*Attorney for Defendants*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
HELENA DIVISION

MAKUEEYAPEE D. WHITFORD,

Plaintiff,

vs.

BRIAN GOOTKIN and JIM  
SALMONSEN,

Defendants.

CV 22-70-H-BMM-JTJ

DEFENDANTS' STATEMENT OF  
UNDISPUTED FACTS

1. Whitford is an inmate currently incarcerated at Montana State Prison ("MSP").<sup>1</sup>

2. Whitford was sentenced to prison for 60 years after he was convicted of deliberate homicide.<sup>2</sup>

---

<sup>1</sup> Amended Complaint (Doc. 21), pp. 1, 2.

<sup>2</sup> Affidavit ("Aff.") of Reich, ¶ 5.

3. On March 16, 2020, Whitford was convicted and sentenced for assaulting MSP staff with bodily fluids.<sup>3</sup>

4. Between 2018 and 2022, Whitford had amassed disciplinary infractions for more than sixteen staff assaults (including the 2 assaults with bodily fluids), more than fifteen instances of threatening staff, two instances of conspiring or attempting to assault staff, and two instances of possession of a weapon.<sup>4</sup>

5. Since arriving at MSP on November 17, 2016, Whitford had only spent 197 days outside of locked housing, out of 2,323 days total at MSP.<sup>5</sup> One hundred and ninety-four of those were in high security general population; three were in the infirmary.<sup>6</sup>

6. As of March 29, 2023, Whitford had spent 2,126 days in locked housing.<sup>7</sup> At MSP, inmates who present an unusually high security risk are housed in restricted housing at administrative segregation custody.<sup>8</sup> In restricted housing, inmates are each housed in

---

<sup>3</sup> Aff. of Reich, ¶ 6.

<sup>4</sup> Aff. of Reich, ¶ 8.

<sup>5</sup> Aff. of Reich, ¶ 10.

<sup>6</sup> *Id.*

<sup>7</sup> Aff. of Reich, ¶ 12.

<sup>8</sup> *Id.*

separate cells and do not intermingle for activities unless they are secured with restraints or placed in a separate caged yard.<sup>9</sup>

7. Prior to Whitford's incarceration at MSP, he was incarcerated at what was then the Crossroads Correctional Center ("CCC") in Shelby, Montana.<sup>10</sup> Whitford was moved from the CCC to MSP because he stabbed another inmate at CCC.<sup>11</sup>

8. Whitford has made threats to stab or otherwise assault MSP staff members.<sup>12</sup>

9. Until August 16, 2023, Whitford was housed in the Secure Adjustment Unit ("SAU"), which is one of MSP's restricted housing units.<sup>13</sup> Whitford was housed in the SAU because of his placement in the restricted housing program due to his continued assaultive and threatening behavior.<sup>14</sup>

10. The SAU is intended to be temporary housing designed to allow inmates the opportunity to improve their behavior so that they

---

<sup>9</sup> *Id.*

<sup>10</sup> Aff. of Reich, ¶ 11.

<sup>11</sup> *Id.*

<sup>12</sup> Aff. of Stefalo, ¶ 26.

<sup>13</sup> Aff. of Reich, ¶ 12.

<sup>14</sup> *Id.*

can transition to regular high security housing (high security side general population; herein, “high-side gen. pop.”).<sup>15</sup>

11. MSP is divided into five different compounds: the high security side (the “high side”), the low security side (the “low side”), the Work and Reentry Center (the “WRC”), the Martz Diagnostic Intake Unit (“MDIU”), and Maximum Security (“RHU”).<sup>16</sup>

12. On August 16, 2023, Whitford was transferred to the general population on the high side (“high side gen. pop.”).<sup>17</sup>

13. Inmates are classified to be housed in one compound or another based on their behavior while incarcerated, treatment and programming compliance and the severity and recency of their crimes.<sup>18</sup>

14. Assaultive or predatory behavior increases the inmate’s score.<sup>19</sup> Whitford scores “administrative segregation custody,” i.e., restricted housing, but that classification has been overridden to “close custody” in high-side gen. pop. because of his recent satisfactory conduct and completion of the restricted housing program.<sup>20</sup>

---

<sup>15</sup> Aff. of Stefalo, ¶ 8; Aff. of Reich, ¶ 14.

<sup>16</sup> Aff. of Reich, ¶ 15.

<sup>17</sup> Aff. of Reich, ¶ 16; Second Aff. of Stefalo, ¶ 5.

<sup>18</sup> Aff. of Reich, ¶ 17.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

15. Whitford's override to high-side gen. pop. is an opportunity for him to display good conduct and includes zero tolerance for assaultive or threatening behavior.<sup>21</sup>

16. Whitford still has a single-cell restriction, meaning MSP staff consider him still too dangerous to have a cell mate.<sup>22</sup>

17. Since August 16, 2023, Whitford has accrued five disciplinary infractions in high-side gen. pop., which indicates that he remains unable to control his behavior.<sup>23</sup>

18. Inmates housed on the high side are not permitted on the low side for any reason.<sup>24</sup> This is due to the more intense security measures required to safely house high security inmates which are not present on the low side.<sup>25</sup> The security situation is more relaxed on the low side compared to the high side.<sup>26</sup> Inmates housed on the low side enjoy more privileges and opportunities than inmates housed on the high side.<sup>27</sup>

---

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Aff. of Reich, ¶ 18.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

19. MSP Procedure 5.5.101 covers how special activities are put on.<sup>28</sup>

20. A powwow is an “other” type of special activity pursuant to § III.A.2.c.1 of Procedure 5.5.101, and is thus subject to the special activities procedure.<sup>29</sup>

21. Pursuant to Procedure 5.5.101, an inmate must have at least six months’ clear conduct prior to the date of the special activity in order to attend.<sup>30</sup>

22. The Procedure 5.5.101 clear conduct restriction is in place to prevent inmates who have recently exhibited dubious behavior from attending an event.<sup>31</sup> The restriction was put into place after inmates assaulted other inmates (including sexual assaults), trafficked contraband, and prison gang members planned and carried out assaults at special events.<sup>32</sup> Inmates not normally affiliated with the special activity group were responsible for the assaults and trafficking.<sup>33</sup> These

---

<sup>28</sup> Aff. of Reich, ¶ 19.

<sup>29</sup> Aff. of Reich, ¶ 20.

<sup>30</sup> Aff. of Reich, ¶ 21.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

acts disrupted the special events.<sup>34</sup> The clear conduct restriction was put into place to prevent a recurrence of the assaults and trafficking.<sup>35</sup>

23. Because no high side inmates may attend any activity on the low side, Whitford will not be allowed to attend the powwow, regardless of whether he has six months' clear conduct at the time of the powwow.<sup>36</sup>

24. In order for a single high-side inmate to attend the low-side powwow, many extra staff would be required in addition to the extra staff required simply to put on the powwow.<sup>37</sup> The inmate would need an escort of at minimum three correctional officers depending on the total number of inmates attending the powwow.<sup>38</sup>

25. Taking a minimum of three officers from their regular high-side postings would undermine the security of the institution.<sup>39</sup> There are not enough correctional officers to schedule any of them for extra hours; indeed, many of them work significant overtime even in the

---

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Aff. of Reich, ¶ 22.

<sup>37</sup> Aff. of Reich, ¶ 23.

<sup>38</sup> *Id.*

<sup>39</sup> Aff. of Reich, ¶ 24.

absence of unusual staffing needs, such as arise during a special event.<sup>40</sup>

26. MSP needs to separate certain inmates from other inmates because of a history of assaults, including sexual assaults; threats; or gang affiliations.<sup>41</sup> In many instances, these separation needs are satisfied by moving the threatening or predatory inmate to the high side while leaving the potential or actual victim on the low side.<sup>42</sup> These separation needs would need to be considered in order for a high-side inmate to attend a low-side event.<sup>43</sup>

27. Special events could—and have<sup>44</sup>—become an opportunity for contraband trafficking.<sup>45</sup> The clear conduct restriction prevents inmates having a recent history of trafficking contraband from gaining access to a wide open market.<sup>46</sup>

28. In the interest of maintaining institutional security, MSP administrators would probably suspend the powwow entirely because

---

<sup>40</sup> *Id.*

<sup>41</sup> Aff. of Reich, ¶ 25.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> See Aff. of Reich, ¶ 21.

<sup>45</sup> Aff. of Reich, ¶ 26.

<sup>46</sup> *Id.*



adequately staffing the special event, regular prison operation, and escorts for a high side inmate would be impossible.<sup>47</sup>

29. Whitford is a member of the Blackfoot Nation. He practices the religion of that nation.<sup>48</sup>

30. MSP has a set of guidelines for carrying out Native American religious programming (the “Guidelines”).<sup>49</sup>

31. The Guidelines include eligibility for participation in the pipe and sweat ceremonies, the selection of the pipe carrier, the selection of the sweat lodge setup crew, operation of the sweat ceremony and pipe ceremony, and drum group practice.<sup>50</sup>

32. Out-of-cell religious activities are available to inmates in high-side gen. pop. as well as inmates in the low security side general population (“low-side gen. pop.”). High-side gen. pop. inmates and low-side gen. pop. inmates do not attend the same activities.<sup>51</sup>

33. As Whitford is no longer housed in locked housing, he is eligible to attend Native American religious ceremonies.<sup>52</sup> These

---

<sup>47</sup> Aff. of Reich, ¶ 27.

<sup>48</sup> Doc. 21, ¶ 21.

<sup>49</sup> Aff. of Stefalo, ¶ 5.

<sup>50</sup> Aff. of Stefalo, ¶¶ 5, 6.

<sup>51</sup> Aff. of Stefalo, ¶ 9.

<sup>52</sup> Second Aff. of Stefalo, ¶ 6.

ceremonies include the sweat ceremony, the pipe ceremony, and the talking circle.<sup>53</sup>

34. Two sweat ceremonies are held every Saturday at the RAC, weather, security, and other legitimate penological concerns permitting. One week, there is a sweat ceremony for low side units A and B, and a sweat ceremony for high side unit (“HSU”) 1; the next week, there is a sweat ceremony for low side units C and D, and a sweat ceremony for HSU 2; then units A and B and HSU 1 again, and the pattern repeats.

54

35. Inmates set up the sweat lodge prior to each ceremony.<sup>55</sup>

36. The sweat lodge setup crew consists of four inmates, plus two alternates. Inmates apply for selection to the setup crew. RAC staff select the setup crew from among the applicants. An inmate must have gone six months without accruing a disciplinary violation to be eligible for selection to the setup crew. This is the “six months’ clear conduct requirement.”<sup>56</sup>

---

<sup>53</sup> *Id.*

<sup>54</sup> Aff. of Stefalo, ¶ 10.

<sup>55</sup> Aff. of Stefalo, ¶ 11.

<sup>56</sup> Aff of Stefalo, ¶ 12.

37. Sweat lodge setup is an out-of-cell activity in which inmates housed in a locked housing unit are ineligible to participate.<sup>57</sup>

38. “Road man” is not a position at MSP Native American religious ceremonies.<sup>58</sup> No inmates are elected to be “road man.”<sup>59</sup>

39. Attending a sweat ceremony is an out-of-cell activity in which inmates housed in a locked housing unit are ineligible to participate.<sup>60</sup>

40. Whitford was eligible to attend sweat ceremonies on August 19, September 2, and September 16, 2023.<sup>61</sup> He attended the sweat ceremonies on August 19 and September 16.<sup>62</sup>

41. Two inmates per side are elected by the respective Native American congregation to carry the sacred pipe. There is one pipe carrier for low-side units A and B; one for low-side units C and D; one for HSU-1, and one for HSU-2. The pipe carriers are responsible for mixing the tobacco, bearberries, and red willow for smoking from the sacred pipe.<sup>63</sup>

---

<sup>57</sup> Aff. of Stefalo, ¶ 13.

<sup>58</sup> Aff. of Stefalo, ¶ 25.

<sup>59</sup> *Id.*

<sup>60</sup> Aff. of Stefalo, ¶¶ 7, 15.

<sup>61</sup> Second Aff. of Stefalo, ¶ 7.

<sup>62</sup> *Id.*

<sup>63</sup> Aff. of Stefalo, ¶ 14.

42. The pipe ceremonies take place in conjunction with the sweat lodge ceremonies; there are also pipe ceremonies separate from the sweat ceremonies. The pipe ceremonies do not require six months' clear conduct to attend.<sup>64</sup>

43. Acting as pipe carrier is an out-of-cell activity in which inmates housed in a locked housing unit are ineligible to participate.<sup>65</sup>

44. MSP is a smoke-free environment, and as such, tobacco is not allowed inside the facility except for at the RAC during pipe ceremonies.<sup>66</sup>

45. Attending a pipe ceremony is an out-of-cell activity in which inmates housed in a locked housing unit are ineligible to participate.<sup>67</sup>

46. Whitford was eligible to attend pipe ceremonies on August 29 and September 12, 2023.<sup>68</sup> Whitford did not attend either pipe ceremony.<sup>69</sup>

47. There is a drum group which can provide drumming for the sweat ceremonies.<sup>70</sup> Any inmate at a sweat ceremony may join the drum

---

<sup>64</sup> Aff. of Stefalo, ¶ 15.

<sup>65</sup> Aff. of Stefalo, ¶ 15.

<sup>66</sup> Aff. of Stefalo, ¶ 16.

<sup>67</sup> Aff. of Stefalo, ¶¶ 7, 15.

<sup>68</sup> Second Aff. of Stefalo, ¶ 8.

<sup>69</sup> *Id.*

<sup>70</sup> Aff. of Stefalo, ¶ 17.

group; drumming at a sweat ceremony does not require six months' clear conduct.<sup>71</sup>

48. Drums are available for inmates, including Whitford, to use at sweat ceremonies.<sup>72</sup>

49. The drum group can practice before playing at the sweat ceremonies.<sup>73</sup> Participation in drum group practice requires six months' clear conduct.<sup>74</sup>

50. Between January 1, 2017 and September 20, 2023, three inmates from high-side gen. pop. have attended drum group practice.<sup>75</sup> One inmate attended on June 15, 2021.<sup>76</sup> Two inmates attended on January 9, 2023.<sup>77</sup> Whitford was not one of these three inmates.<sup>78</sup>

51. Inmates often use the RAC facilities to pass contraband and unauthorized communications among themselves.<sup>79</sup> Preventing the transfer of contraband and unauthorized communications are important institutional security functions.<sup>80</sup>

---

<sup>71</sup> *Id.*

<sup>72</sup> Second Aff. of Stefalo, ¶ 17.

<sup>73</sup> Aff. of Stefalo, ¶ 18.

<sup>74</sup> *Id.*

<sup>75</sup> Second Aff. of Stefalo, ¶ 10.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Second Aff. of Stefalo, ¶ 13; *and see* Exhibit F.

<sup>80</sup> Second Aff. of Stefalo, ¶ 13.

52. The six months' clear conduct requirements help fulfill these important security functions by restricting some religious functions to inmates who have demonstrated their trustworthiness by keeping clear conduct.<sup>81</sup>

53. Inmate religious congregations may petition to hold special activities on the MSP campus.<sup>82</sup>

54. The Native American low-side gen. pop. congregation has petitioned to hold a powwow as a special activity at MSP.<sup>83</sup> It is likely that the petition will be granted, and there will be a powwow held at MSP in December of 2023.<sup>84</sup> Guests will be invited to the powwow.<sup>85</sup>

55. The last powwow at MSP took place in 2019.<sup>86</sup> A powwow has never been a regularly occurring event at MSP.<sup>87</sup>

56. The powwow will be a low side activity; inmates housed on the high security side of MSP will not be eligible to participate.<sup>88</sup>

---

<sup>81</sup> Second Aff. of Stefalo, ¶ 14.

<sup>82</sup> Aff. of Stefalo, ¶ 20.

<sup>83</sup> Aff. of Stefalo, ¶ 21.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*, and see Exh. B, § II. for the definition of "guest."

<sup>86</sup> Aff. of Stefalo, ¶ 22.

<sup>87</sup> *Id.*

<sup>88</sup> Aff. of Stefalo, ¶ 23; Aff. of Reich, ¶ 18.

57. An inmate must have six months' clear conduct in order to participate in the powwow.<sup>89</sup>

58. MSP inmates are prohibited from smoking and use of tobacco or tobacco substitutes pursuant to MSP Procedure 3.4.3, except as permitted for legitimate inmate spiritual practices such as those set forth in the Guidelines.<sup>90</sup> This prohibition is in accordance with the Montana Clean Indoor Air Act to provide a tobacco-free work and living environment for employees, visitors, and inmates.<sup>91</sup>

59. Smoking accessories such as pipes are contraband at MSP.<sup>92</sup>

60. An inmate allowed to possess a pipe could use the pipe to ingest tobacco or other contraband or allow other inmates to ingest tobacco or other contraband.<sup>93</sup> An inmate could alter a pipe into a weapon or other contraband.<sup>94</sup>

61. MSP Procedure 3.4.3 prohibits staff, visitors, and inmates from possessing tobacco products and paraphernalia on prison property,

---

<sup>89</sup> Aff. of Stefalo, ¶ 24.

<sup>90</sup> Aff. of Reich, ¶ 28.

<sup>91</sup> *Id.*

<sup>92</sup> Aff. of Reich, ¶ 29.

<sup>93</sup> Aff. of Reich, ¶ 30.

<sup>94</sup> *Id.*

except that staff members and visitors may keep tobacco products and paraphernalia in their personal vehicles in the parking lot.<sup>95</sup>

62. Staff members who bring tobacco products on MSP property, other than in personal vehicles or the parking lot are subject to disciplinary action.<sup>96</sup>

63. Visitors who bring tobacco products or paraphernalia into MSP will be terminated from visiting.<sup>97</sup>

64. Inmates are prohibited from smoking and tobacco use except for legitimate inmate spiritual practices such as the Native American smoke ceremony, which is confined to the RAC.<sup>98</sup>

DATED this 22nd day of September 2023.

AGENCY LEGAL SERVICES BUREAU

/s/ Jeremy S. Craft

JEREMY S. CRAFT

Agency Legal Counsel

---

<sup>95</sup> Exh. G, §§ III.B.1 3, 4 (the second § 4).

<sup>96</sup> *Id.*, § 6.

<sup>97</sup> *Id.*, § 8.

<sup>98</sup> *Id.*, §§ 10, 10.a.



CERTIFICATE OF SERVICE

I certify that on September 22, 2023, I electronically filed the foregoing document with the clerk of the court for the United States District Court for the District of Montana, using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that on September 22, 2023, I caused a copy of the foregoing document to be served by first class mail to:

Makueeyapee D. Whitford, #3015941  
Montana State Prison  
700 Conley Lake Road  
Deer Lodge, MT 59722

/s/ Jeremy S. Craft  
JEREMY S. CRAFT  
Agency Legal Counsel